

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs (pre-1965)

---

1959

# State of Utah v. Leroy Iverson : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Jay E. Banks; Peter F. Leary; John L. Black; Walter L. Budge; Counsel for Plaintiff and Appellant;

---

### Recommended Citation

Brief of Appellant, *State v. Iverson*, No. 9103 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3426](https://digitalcommons.law.byu.edu/uofu_sc1/3426)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

STATE OF UTAH,  
*Plaintiff and Appellant,*  
—VS.—  
LEROY IVERSON,  
*Defendant and Respondent.*

---

BRIEF OF APPELLANT

---

JAY E. BANKS, District Attorney  
of the Third Judicial District in  
and for the County of Salt Lake,  
State of Utah

PETER F. LEARY, Assistant

JOHN L. BLACK, Assistant

WALTER L. BUDGE, Attorney  
General, State of Utah

*Counsel for Plaintiff and  
Appellant*

---

## TABLE OF CONTENTS

|                                                                         | <i>Page</i> |
|-------------------------------------------------------------------------|-------------|
| PRELIMINARY STATEMENT .....                                             | 1           |
| STATEMENT OF FACTS .....                                                | 1           |
| STATEMENT OF POINTS .....                                               | 21          |
| ARGUMENT .....                                                          | 21          |
| POINT I. THE TRIAL COURT ERRED IN<br>TAKING THE CASE FROM THE JURY..... | 21          |
| CONCLUSION .....                                                        | 34          |

## AUTHORITIES CITED

|                                                                           |                    |
|---------------------------------------------------------------------------|--------------------|
| State v. Booth, 59 P. 553, 21 U. 88.....                                  | 24                 |
| State v. Cheeseman, 223 P. 762, 63 U. 138.....                            | 24                 |
| State v. Gordon, 1903, 76 P. 882, 28 U. 15.....                           | 28                 |
| State v. Karas, 1939, 136 P. 788 .....                                    | 28                 |
| State v. Peterson, 1952, 240 P. 2d 504, 121 U. 229.....                   | 27                 |
| State v. Sandman, 1955, 286 P. 2d 1060, 4 U. 2d 69.....                   | 23, 24             |
| State v. Sullivan, 1957, 307 P. 2d 212, 6 U. 2d 110.....                  | 27, 28             |
| State v. Thatcher, March 29, 1945, 157 P. 2d 258,<br>108 U. 63 .....      | 23, 24, 25, 26, 34 |
| State v. Twitchell, January 15, 1959, 333 P. 2d 1075,<br>8 U. 2d 314..... | 22                 |

## STATUTES CITED

|                                            |    |
|--------------------------------------------|----|
| 76-30-7.4, Utah Code Annotated, 1953 ..... | 22 |
| 77-31-31, Utah Code Annotated, 1953 .....  | 26 |

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

STATE OF UTAH,

*Plaintiff and Appellant,*

—vs.—

LEROY IVERSON,

*Defendant and Respondent.*

Case No.  
9103

---

BRIEF OF APPELLANT

---

PRELIMINARY STATEMENT

The appellant will be referred to as the State and the respondent will be referred to as the Defendant. All italics are ours.

STATEMENT OF FACTS

This appeal results from a prosecution brought by the State against Defendant for the crime of Automobile Homicide. The information filed by the District Attorney charged the Defendant as follows: (R. 10)

"That the said LeRoy Iverson, on or about August 23, 1958, in the County of Salt Lake, State of Utah, he being then and there a person driving and operating a vehicle on a public highway, while then and there under the influence of intoxicating liquor, did then and there drive said vehicle negligently, carelessly and recklessly, so as to cause the death of another, to wit: Hermania Padilla;"

On the information aforesaid and Defendant's plea of not guilty, trial was commenced before a jury in the Third Judicial District Court for Salt Lake County, Utah, at 10:00 o'clock a.m. on May 19, 1959.

The State produced voluminous evidence which will be referred to hereinafter and then rested (R. 401). At that time Counsel for Defendant made a Motion to Dismiss the action for the reasons and upon the grounds that there was no evidence to prove that the Defendant was under the influence of intoxicating liquor sufficient to impair his ability to drive to a degree which rendered him incapable of safely driving his automobile and that there was no evidence produced to show that the Defendant drove his car in a reckless, negligent, or careless manner or with a wanton or reckless disregard of human life or safety (R. 401-402). Counsel for Defendant argued said Motion to the Court, and the Court reserved its ruling on this Motion (R. 406).

After all of the evidence had been produced by both sides and both sides had rested, Defendant made a Motion to Dismiss the charge against Defendant and for a Directed Verdict on the ground that the evidence

conclusively showed to the extent that reasonable minds could not differ that the State had failed to make out a prima facie case or to sustain the burden of proof that the offense may have been committed and that there was not sufficient evidence to go to the jury to show that a public offense had been committed in this instance.

In the alternative, Defendant made a Motion that the Court strike from the record and admonish the jury not to consider any of the evidence regarding the chemical test taken of the blood sample.

The Court reserved these Motions (R. 651-652) and submitted the case to the jury upon the Court's instructions (R. 653).

After deliberating for approximately four and one-half hours the jury returned with a verdict of guilty (R. 658).

Upon polling the jury, it appeared that one of the jurors changed his mind and refused to concur with the guilty verdict (R. 662).

Upon being informed by said juror that he did not believe that he would change his mind and that the jury had discussed the case thoroughly, the Court declared that the jury was a "hung jury" and discharged the jury (R. 663).

The Court kept the Motions that had been made by Defendant under advisement and made his ruling on June 24, 1959, dismissing this action (R. 68).

The Court in making his ruling on the Motions which he had reserved rendered a Memorandum Decision and Ruling (R. 68 - R. 70). In the Memorandum filed by the Court, the Court granted the Motion for Dismissal on the following grounds:

“1. There was no evidence of defendant being under the influence of liquor.

2. No evidence to show defendant drove his car recklessly, negligently, or in disregard of the safety of others.

3. No evidence to show the blood test had not been meddled with.

4. No evidence of intoxication.”

The Court then went on to explain the reasons for his ruling. The Court in explaining his reasons stated in part as follows:

“There was no direct or clear evidence that defendant was under the influence of liquor. There was an expression by one witness that his breath smelled, but then the witness admitted the man had been badly injured, and that may account for it, in part at least.

“A deputy sheriff testified that defendant stood by a patrol car, and the witness assumed he was drunk until he learned the man had been injured and was in a state of shock, and then said, ‘he then was not so sure as to his being drunk; it might have been the shock.’ He thought from his face, voice, and walk that he was suffering mostly from shock. He knew Iverson only by sight, had no conversation with him, and only saw him walking to another car. There were no

signs of intoxication.

"The next witness said defendant appeared to be ill. He walked O. K. Only reasons for thinking defendant was drunk was the fact that 'he said he didn't know there had been an accident,' and some smell of his breath.

"The next witness took defendant for a blood test. The only conversation coming in was defendant saying he was sorry, and had lost a son himself. Knew defendant was terribly emotionally upset by the accident and loss of his own son. 'I would have thought Iverson under the influence of liquor, even though there was no smell of liquor and no words or actions showing any signs of drink.' No further statement or explanation given by the witness.

"The deputy sheriff who got the blood sample from the doctor stated that he would say that any person who had one drink was under the influence of liquor, and then stated that 'Iverson was not intoxicated.'

"The final witness who made the measurements, etc., of the accident, said 'there was nothing to indicate Iverson going at more than 50 miles per hour,' the legal speed.

"There was no dispute about the fact that defendant, at dinner time that afternoon, had three or four drinks just before or after dinner. It was shown by his doctor, Doctor Marshall, that defendant had, while on the Police Force, been badly beaten up by several rough fellows while trying to stop a disturbance two years ago; that he still has pain and trouble from that assault, and oftentimes very depressed or emotionally upset; that they had given him several sedatives, and



had found that a highball or two in the evenings after day's duties are done is the best sedative for him. 'Think emotional upsets bothered more than shock.'

"The witness who directed the investigation in all its aspects declared there was no evidence the defendant was under the influence of liquor except a slight smell in his breath, and added, 'except for that smell in the breath, I would not have asked Iverson to even take the blood test.'

"So there is no tangible evidence to sustain any finding or conclusion that the accident occurred because the defendant was drunk or under the influence of intoxicating liquor.

"There was some argument that the proof of intoxication was established by the report of the Utah State Chemist as to the alcohol in the blood of defendant. Here is the record:

"The doctor who drew the blood, and put it in the bottle furnished by the officers, testified definitely that the blood he put in the bottle filled the bottle to the half-way mark, or *just above it*. The officers who received the bottle from the doctor also testified the bottle, as they received it, was '*just over half filled*.' They delivered the bottle about two days later to the State Chemist. He testified that when he received the bottle it was full up on the shoulder, and he made a red mark on it to show the amount he received. His report as to alcoholic content might justify, in part, the presence of enough alcohol to affect human behavior, but not when the bottle contents exceed the quantity taken from the vein of the person. The report is not competent evidence and cannot be considered as any evidence at all in

the record. If it is to be considered at all, it would prove it was not Iverson's blood test.

"It follows, therefore, that the evidence is wholly deficient to sustain a verdict against defendant, and the action is dismissed."

The accident out of which this prosecution arose, took place and occurred on 21st South Street at approximately a mile and a quarter west of Redwood Road at approximately 9:30 to 9:40 o'clock p.m. At the time of the accident, it was dark and the weather was clear and the road was dry. Redwood Road at the place in question is a highway running in an east-west direction with two lanes separated by a dashed-single line approximately 41 feet in width with each lane being approximately 20 feet and 5 inches in width. The road surface was asphalt and in smooth good condition. The road at the place in question is level. (Exhibit 1)

The evidence showed that the Iverson car approached the Padilla car from the rear, both automobiles traveling west and in the west-bound lane of traffic. Furthermore the evidence shows that the Iverson automobile collided into the right rear of the Padilla automobile with its left front at a point approximately 9 feet north of the center line of the highway (Exhibits 1, 2, 19, 3, and 7).

After impact, the Padilla car traveled approximately 251 feet swerving to the left and off the left side of the road ending up upside down and against a telephone pole facing in an easterly direction, and the Iverson car

traveled approximately 254 feet and off to the right side of the road ending up facing north (R. 303, 304, 315, and 321).

The three year old child, Hermania Padilla, in the back seat of the Padilla automobile was killed in the accident in question (R. 118, Exhibit 11).

The following herein will be a summary of the evidence produced by the State viewed in a light most favorable to the State inasmuch as the trial court viewing the evidence most favorable to the State held that the State has not established a prima facie case.

On the night in question, David Padilla and his wife, Lydia, had been visiting friends at Air Base Village and were proceeding to their home at 4715 South 4165 West in Kearns, Utah. In their 1954 Plymouth automobile they had their three-month old son, Phillip, and in the back seat their three-year old daughter, Hermania. They proceeded south on Redwood Road and turned west on 21st South. In proceeding west on 21st South, David Padilla was operating his automobile at a rate of speed of approximately 45 miles per hour. Shortly prior to the accident he and his wife had been discussing how the speed limit sign automatically changes from 60 miles per hour during the day time to 50 miles per hour at night and for that reason had occasion to note the speed at which he was traveling.

Immediately prior to the accident the Padilla car was in good condition and the tail lights had been recently

inspected and were working. He was driving on the right side of the highway in a normal way and the next thing he knew he was in the hospital (R. 117-121).

Deputy Sheriff Pete Kutulas was the officer in charge of the investigation of the accident in question. He investigated the scene of the accident and took measurements and reconstructed the accident for the Court and jury. This investigation revealed that the Iverson automobile layed down a skid mark of 112 feet bending to the right to the point of impact. It further established that substantial damage was done to both automobiles in the impact between them (Exhibits 7, 6, 2, 19 and 3). After impact the Padilla car traveled 241 feet and experienced another substantial impact into a telephone pole and the Iverson automobile traveled another 254 feet, and this with a badly damaged left front wheel. The left rear tail light of the Padilla automobile was still on at the time that Officer Kutulas made his investigation. The foregoing evidence would clearly authorize a jury to find that Iverson was traveling at a speed considerably in excess of the 45 miles per hour which the Padilla automobile was traveling (R. 311-321).

State's witness Ronald Zeldon Wall, testified that he was proceeding in an easterly direction on 21st South immediately prior to the accident. He observed the Iverson car immediately prior to the accident when the Iverson car passed him as he described it 'too close to the center line to be safe' and traveling 'a heck of a lot faster than he should have been.' The witness estimated

Iverson's speed at close to 90 miles per hour (R. 95).

The witness took special note of the Iverson car in his rear view mirror prompted by the way in which the Iverson car passed him and observed the dust produced by the collision. The witness also stated that the Iverson car was definitely traveling at a greater rate of speed than the other vehicles going the same direction (R. 92).

The following evidence was produced by the State in regard to whether or not Iverson appeared to be under the influence of alcohol immediately after the accident and following.

Robert Hayward of the Utah Highway Patrol arrived at the scene of the accident shortly after the accident. He observed Iverson standing on the driver's side of his car and leaning against the car. He had a conversation with Iverson at that time in regard to whether or not he was driving the automobile and whether or not he was hurt, to which Iverson replied that he was not hurt. He observed that Iverson was unsteady on his feet and that his breath smelled of alcohol. Also he observed that his face appeared to be "flushed." In addition to this he noted that his speech was "a little slurred, thick tongue speech." Officer Hayward testified that in his opinion Iverson was under the influence of alcohol. He further testified that the muscular coordination of a person under the influence of alcohol is impaired (R. 142-151).

Counsel for Defendant cross examined Officer Hay-

ward as to the possibility of Iverson exhibiting the same symptoms as in a state of shock and on redirect examination Officer Hayward stated that he did not believe that there were any symptoms exhibited by Mr. Iverson on the night in question that would indicate shock (R. 158).

George A. Sorensen, who is a photographer and reporter for the Salt Lake Tribune, testified as to Iverson's condition after the accident. The first time he observed Iverson was in the emergency ward of the General Hospital. He was also in Iverson's presence, that same night at the County Jail. He stated that Iverson's face was red and that he weaved slightly as he moved and that his speech was a little thick-tongued as he talked. The witness also testified that he had had experience on the newspaper and in the army with persons who had had various amounts of alcohol to drink. He testified that in his opinion Iverson was under the influence of alcohol at the time that he saw him (R. 161-167), and not in a state of shock (R. 178).

Deputy Sheriff Keith Iba testified that he could smell alcohol on Iverson's breath and that he wasn't too steady on his feet and that his face had a red-flushed look to it and that his speech was more or less rough and that his words did not seem to end sharply, but seemed to carry on. He stated that he thought these things could have been caused either by shock or by alcohol (R. 205-209).

Deputy Sheriff Blaine A. Barnes testified that he

assisted with the investigation and that he was in the presence of Iverson in his prowl car for approximately one hour that night. He stated that when he first approached Iverson when he was standing and leaning on the car that Iverson informed him that he was all right and that later Iverson was placed in the back seat of his prowl car. He stated that Iverson said that he did not know that there had been an accident and that he had had a little to drink. He stated that in his opinion Iverson was under the influence of alcohol (R. 247-250). He further stated that Iverson talked with a thick tongue and that his speech was loud and boisterous (R. 253).

Deputy Sheriff Donald Clay Weston testified that he and Deputy Don Fox took Iverson to the hospital on the night of the accident and that he assisted in the process of taking the blood sample by getting a bottle from the cabinet and giving it to Deputy Fox. Also he assisted in taking Iverson to the County Jail and later in giving Iverson a ride back to his home. He further testified that Iverson's speech was a little thick like he had been drinking, that he could smell alcohol on his breath and that his walking was a little unsteady. He gave it as his opinion that Iverson was under the influence of alcohol (R. 263).

Deputy Sheriff LeGrande H. Nordgran was in the presence of Iverson for ten to fifteen minutes on the night of the accident and although he could smell alcohol on the breath of Iverson he did not believe that he was under the influence of alcohol for the reason that he

answered the questions clearly and that he was not weaving excessively (R. 190).

Deputy Sheriff Donald Ray Fox who took Iverson to the hospital and to the County Jail on the night of the accident stated that Iverson's face was flushed and that he talked with a thick tongue and that he was a little unsteady on his feet (R. 285). At (R. 288) he testified that in his opinion Iverson was under the influence of alcohol. On being recalled for further cross examination by Defendant at (R. 365) he stated that in his opinion Iverson was not "intoxicated."

Deputy Sheriff Pete Kutulus stated that he observed Iverson on and off for about a period of approximately one hour. He stated that Iverson's speech was somewhat impaired inasmuch as he was repeating himself and talking a little louder than his normal tone of voice. Also he stated that his eyes were a little glassy and that he could smell alcohol on him. When he asked Iverson if he had been drinking he replied "yes, very little." Furthermore Iverson stated that he was unable to recall how the accident had happened. Also Iverson informed him that he did not think that he was injured. The Officer further testified that he thought that Iverson was in a state of shock and that he might be under the influence of alcohol (R. 322-325).

In regard to the blood test evidence Doctor K. Hill Blacker testified that at the time of the accident he was an intern at the Salt Lake County General Hospital. He testified that on the night of the accident he took a blood



sample from the Defendant. He stated that he drew approximately 10 c.c.'s of blood from Iverson after preparing the arm with a non-alcoholic solution and that he placed the blood in a clean bottle. After putting the blood in the bottle he placed a piece of adhesive tape over said bottle to seal it and placed his name alongside on the tape (R. 228-232).

On cross examination testifying from his memory, the doctor stated that he thought he had drawn either slightly more or slightly less than 10 c.c.'s of blood from Defendant Iverson. In attempting to get an exact estimate from the doctor as to exactly where the level of blood was on the bottle itself, the following occurred on cross examination:

“Q. You testified on your preliminary hearing that that vial was just a little better than half full, possibly half or a little better than half full.

A. At the time of the preliminary hearing?

Q. Yes.

A. May I see the bottle?

Q. Yes. (Handing exhibit to witness.)

A. It doesn't look quite half full now.

Q. No.

Now, would it help you to refresh your memory on the preliminary hearing? (Reading.)

‘Question: Now, how full was the tube or the bottle?’

‘Answer: With the blood?’

‘This is your testimony here, Doctor.

A. Uh huh.

Q. And I says: (Reading)

‘Question: With the blood, yes.

‘Answer: Oh, probably half way or a little more.’

A. Yes.

Mr. Beck: (Reading)

‘Question: A little more than half way filled, you’d say?

‘Answer: I would assume, yes. Yes, I think so.

‘Question: And what is left in this test tube here is about — almost half, isn’t it, Doctor?

You said: (Reading)

‘Answer: Oh, I’d say it was about a third.’

Q. Now, is that the way you want your testimony to stand today, Doctor, that that tube is a little bit more than half filled?

A. You mean at the time, at the evening the tube was more than half filled?

Q. Yes.

A. Yes.

Q. According to this testimony.

A. I believe that’s correct, yes.

Q. And that the tube wasn’t filled, and it was just a little bit more than half filled.

A. How much, the exact amount, I couldn’t, I couldn’t say.

Q. Doctor, I don’t want to embarrass you

at all. I just want you — I can see your problem, it's an approximation with you. And all the jury and the Court wants to know, under your circumstances, approximation, under your testimony in the preliminary hearing you testified it was a little bit better than half full. Now, is that what you said?

A. At the time of the preliminary hearing I said that I thought the evening of the accident that the tube was more than half way full, is that right?

Q. Yes.

A. That's —

Q. According to your testimony here.

A. As near as I can recall, that's correct.

Q. (Reading) 'A little more than half way filled, you'd say?'

'Answer: I would assume, yes. Yes, I think so.'

A. Well, I believe that's so.

Q. And you want the Court and the jury to understand that this tube was just a little more than half filled.

A. Well, I want, first, that the exact amount of blood in it, I, I am uncertain of. And that was —

Q. I know you are, Doctor.

A. Well, I can't say specifically how many c.c.'s of blood were in it. I believe that it was more than half full.

Q. No, but according to your best judgment. I'm not holding you down to a specific amount. If you filled it up to the top, and you put a cork

in it and it splattered, you'd know that.

A. If it had splattered, I probably would know that.

Q. Yes, you'd know that, and it was full. But you said on preliminary 'a little more than half,' is that right?

A. Let's — As I say, I don't know what your definition of 'a little' would be.

Q. Well, we'll leave that to the jury and the Court to determine. That's their problem. I don't know what you mean, either. I know a little is just very little. And when you use the term, I know they will not think and I will not think it's a lot."

The transaction of taking defendant's blood did not take up more than two or three minutes of the doctor's time (R. 246).

The witness, Donald Ray Fox, testified that he received the bottle with the blood and signed it, putting Iverson's name on it, the date, the time, and then he handed it to the doctor for his initials.

He testified that the bottle when he received it was clean and dry. Then he marked every place that one piece of tape crossed another piece of tape (R. 278-280). He testified that as near as he could remember that the bottle containing the blood was around three-quarters full (R. 295).

Officer Fox testified that he then put the bottle with the blood in his left front pocket (R. 282) and that he kept the bottle in his possession until he returned to

the scene of the accident and delivered it to Deputy Sheriff Kutulus (R. 286-287). He testified that during the time that he had the bottle in his possession it had not been bothered or touched until he delivered it to Officer Kutulus (R. 287).

Officer Kutulus testified that when he received the bottle with the blood from Deputy Fox, that it was not quite full but nearly full (R. 333). He testified that he put it in his shirt pocket and retained it in his personal possession. He took it home, put it in his refrigerator until the following Monday morning at which time he personally submitted it to the office of the State Chemist. He further testified that the bottle was not in any different condition from the time that he received it until the time when he turned it over to the State Chemist.

Mr. H. Kent Francis, a chemist in the office of the State Chemist, testified that he received the bottle in question from Officer Pete Kutulus on August 25, 1958 at 10:10 a.m. He testified that after receiving the bottle he cut the tape with a razor blade in order to remove the stopper and that he made a red crayon mark at the top to indicate the top level of the contents at the time received. He then removed 3 c.c.'s of blood from the vial and tested it (R. 346). Mr. Francis tested the blood and found that it contained a percentage of alcohol amounting to .245 per cent by weight. He explained the procedure that he went through and pointed out that he double checked his calculation (R. 346-352) (Exhibit 8).

Doctor Stewart C. Harvey, a doctor of pharma-

cology, testified that he has had substantial training and experience in the study of the effects of drugs and chemical agents upon the body, including the effects of alcohol (R. 366-367). He testified that the amount of oxidation which would result in lowering the blood percentage with the passage of time was remarkably constant from individual to individual and that this would be from .02 to .03 per cent per hour and that assuming a .245 percentage of alcohol an hour and one-half after an accident, that in his opinion the percentage at the time of the accident would be from .275 to .290. He also testified that a person will pass out from alcohol usually from a .3 to a .5 percentage of alcohol (R. 380). The doctor testified at (R. 400) that any person with a .245 alcohol percentage would have serious impairment to his driving ability. The doctor testified at (R. 377) as follows:

"By the time .15 is reached, I believe that it is the considered opinion of everyone in this field that there will be affect on everyone, the extent of which may vary somewhat from individual to individual, but —

Q. (By Mr. Banks) And would the effects, or would such an individual, would such an individual's ability to drive an automobile be impaired?

A. Yes, sir.

Q. Assume, Doctor, than an individual has a .245 percentage of alcohol by weight in his blood. Would that individual be under the influence of alcohol?

A. Yes, sir.

Q. Would he be impaired as to his abilities to drive an automobile?

A. Yes, sir, I believe so.

Q. And will you tell us how or why he would be impaired in driving an automobile?

A. Well, as I indicated earlier, in our own tests, one of the first indices to show a deficiency was that of distant judgment. This occurred at blood levels below .1 in most individuals, even as low as .04.

In addition, there is impairment of motor coordination, the ability to make appropriate movements of the various muscles which would be used for guiding the automobile, stepping on the brake, turning the wheel, and so forth; even to the coordination of the movements of the eye-balls, so that they will focus appropriately on the object.

And obviously motor incoordination will affect the driving, as will distance judgment. The more complex the act, it has been shown, the more the impairment. So that while a person may show only a minor affect on reaction time in a given stereotype situation, as soon as he is in a more complicated situation his reaction time is increased, because there is in the element of reaction time also a judgment as to whether he should react.

Many people have investigated the effect of alcohol on driving ability. One of the Scandinavian groups referred to, Bjerver and Goldberg, came to the conclusion that driving ability was impaired at a blood level as low as .03 to .045.

In recent study made by a group of British psychologists concluded that an .08 per cent in the blood there was a 16 per cent deterioration in driving skill. And there are numerous other studies that indicate the same.

In both Toronto and Evanston, groups of workers studied the relationship of blood alcohol concentration to incidents of involvement in accidents. The conclusion was drawn that a level, at a level of .15, by the Toronto group, that the accident susceptibility of the individual was increased ten times. The Evanston group drew a conclusion that it was increased fifty-five times. There being some discrepancy, but indicative of the fact that at least there is an increase in accident susceptibility at this and lower levels.

Q. What level are you speaking of at the present time?

A. This level was .15."

The defendant himself testified at (R. 542) that he could have had five drinks of Seagrams V. O. that evening prior to the time when he left his home and proceeded to the accident.

## STATEMENT OF POINTS

### POINT I

THE TRIAL COURT ERRED IN TAKING THE CASE FROM THE JURY.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN TAKING THE CASE FROM THE JURY.



The defendant was charged with the crime of Automobile Homicide which was enacted into law in 1957 and is contained in 76-30-7.4, Utah Code Annotated. This statute states as follows:

“Any person, while under the influence of intoxicating liquor or narcotic drugs, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, who causes the death of another by operating or driving any automobile, motorcycle or other motor vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than ten years. A death under this section, is one which occurs as a proximate result of the accident within a year and a day, after the day of the accident.”

The constitutionality of this statute has been upheld. See *State vs. Twitchell*, January 15, 1959, 333 P. 2d 1075, 8 U. 2d, 314.

From the wording of the statute itself it appears that a person can be convicted upon the State proving beyond a reasonable doubt that said person was under the influence of liquor to a degree rendering him incapable of safely driving a vehicle and by operating said vehicle while in such a state in a negligent manner, thereby causing the death of a victim. The trial Court in Instruction No. 13 defined the crucial elements of this crime as follows:

“Two, that at said time the defendant was under the influence of intoxicating liquor to such a degree as to render him incapable of safely driving said automobile; *Three, that said automobile was driven in a reckless, negligent, or careless manner with a wanton or reckless disregard of human life*; and Four, that the death of Hermania Padilla was the proximate result of said accident and occurred on the 23rd day of August, 1958, and within a year and one day after the day of said accident.”

It appears from element No. 3 in the aforesaid instruction that the trial court gave the State a greater burden than it actually has from the wording of the statute, when it requires negligence *with* a wanton or reckless disregard of human life. The statute only requires negligence *or* driving with a wanton or reckless disregard of human life. This Court in the Twitchell case held that the legislature could substitute an unlawful status for the required criminal intent in a felony prosecution. It may very well have been that the trial Court's misconception of the requirements of the statute played a part in his error in taking the case from the jury.

The State has the right to appeal from a dismissal of the case as rendered by the trial judge in the case at bar. This proposition has been well established in Utah. The case of *State vs. Thatcher*, March 29, 1945, 157 P 2d. 258, 108 Utah 63 involved an appeal by the State from a dismissal by the trial judge after the evidence for the State had been presented. Also see *State vs.*

*Sandman*, 1955, 286 P 2d. 1060, 4 Utah 2d 69, *State vs. Booth*, 59 P. 553, 21 Utah 88, and *State vs. Cheeseman*, 223 P. 762, 63 U 138.

The Thatcher case, *supra*, established clear guide posts in regard to the function of the trial court in criminal cases. This case contained a thorough discussion dealing with the right of a trial judge to dismiss criminal cases on the evidence.

It involved a prosecution for involuntary manslaughter arising out of defendant driving his automobile into a group of pedestrians. There was evidence to the effect that defendant had been driving his automobile at a rate of speed of 60 miles per hour and did not appear to lessen this speed before impact and that the five pedestrians were from one to four feet west of the west edge of the highway. After the evidence for the State had been presented, defendant made a motion for dismissal which was granted. From this judgment of dismissal the State appealed.

The Court in reviewing the evidence reiterated the well-established legal principle that a Motion for Dismissal and for Directed Verdict for defendant is in effect a demurrer to the evidence and that it admits the truth of the evidence as disclosed by the record and every reasonable inference that might be drawn therefrom. The Court held that when different reasonable inferences can be drawn from the evidence, the question is one exclusively within the province of the jury and it is not the function of the Court to substitute its judgment

on questions of fact for that of the jury. The Court, in reviewing the evidence in a light most favorable to the State, held that the Trial Court had infringed on the function of the jury and that its dismissal of the case was reversible error. The test which this court layed down was that the Trial Court could dismiss a criminal case only if the record reveals that no reasonable man could draw an inference of guilt therefrom. Justice Wolfe in a concurring opinion further elaborated on this rule. At page 264 he stated,

“If the evidence under any reasonable interpretation would sustain a verdict of guilty, the judge is required to let the case go to the jury.”

In dealing with an argument made by counsel for defendant in the Thatcher case to the effect that the Trial Court was in a position to observe the demeanor of witnesses, and therefore should be given great latitude, Justice Wolfe replied at Page 263,

“It is contended that because the trial court had the opportunity to note the demeanor of the witnesses some weight, independently of the record, should be given to his judgment dismissing the action. This is not the law. Before the trial court can tell the jury that it cannot consider the testimony of a particular witness it must appear from the record that it was so untrustworthy that no reasonable man could have given it any weight. And only if an essential element of the state's case is based entirely on such evidence could the court withdraw the case from the jury. Where inferences and conclusions may reasonably be drawn from the testimony

which would support a verdict of guilty, we cannot indulge the trial court the luxury of presuming independently of the record that the demeanor of the witnesses was such that it nullified such inferences and conclusions. To do so would bring to a standstill any review by this court of the question of whether reasonable men could draw from the evidence a conclusion of guilt. Upon dismissal of a criminal case the answer would always be that within the breast of the trial court resided knowledge not revealed by the record that the witnesses were so untrustworthy as to overcome any inference of guilt which could be drawn from the record itself. The rule which must be applied upon a motion to dismiss a criminal case is that all reasonable inferences are to be taken in favor of the state, and only if the record itself reveals that no reasonable man could draw an inference of guilt therefrom is the trial court justified in taking the case from the jury. No such situation is revealed by this record."

Further on Page 264, Justice Wolfe stated.

"But 'mere contradictions of the testimony of a witness will not suffice to constitute inherent improbability or to destroy its weight' so as to justify a court in disregarding such testimony. \* \* \* Also in criminal cases the case may be taken from the jury where it can be said beyond doubt that no reasonable men could find the defendant guilty without entertaining a reasonable doubt."

The court in the Thatcher case gave force and effect to the well-known rule that the jury is the exclusive judge of the facts in a criminal case. *Section 77-31-31 Utah Code Annotated, 1953*, states that questions of law are to be decided by the court and questions of fact

by the jury. There have been some Utah cases which have given emphasis to this rule. These are cases where it has been urged on appeal that the trial court erred in refusing to direct a verdict of acquittal. This court has uniformly held in such cases that when there has been competent evidence adduced from which the jury could find beyond a reasonable doubt that the defendant is guilty, there can be no error in failing to direct a verdict of acquittal. Such a holding exists in the case of *State v. Peterson*, 1952, 240 P. 2d 504, 121 Utah 229, where defendant's guilt rested primarily on circumstantial evidence and where defendant himself presented an account of his conduct during the time in question which was corroborated in many details by his wife and grandmother. Such a ruling resulted also in the case of *State vs. Sullivan*, 1957, 307 P 2d 212, 6 Utah 2d 110. In this case the evidence was entirely circumstantial. This court also affirmed the trial court in refusing to direct a verdict even though conceding that there were weaknesses in the State's case upon which a jury could very well have entertained a reasonable doubt as to defendant's guilt. The court stated at page 215,

“Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendants committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must stand. The very essence of trial by jury is that the jury are the exclusive judges of the weight of the evidence, the credibility of the witnesses and the facts to

be found therefrom."

A comparison can be made between the foregoing cases and the cases of *State vs. Karas*, 1913, 136 P 788, 43 U 506, and *State vs. Gordon*, 1903, 76 P 882, 28 Utah 15. These were cases in which the court held that the trial court should have granted a motion to direct a verdict of acquittal. It can be seen from reading these two cases that there was an utter lack of evidence to sustain a conviction. In the Karas case the sole evidence on which the conviction was based was voice identification by a person with whom the defendant had not spoken on previous occasions. In the Gordon case there was an utter lack of evidence connecting the defendant in any way with the crime other than the fact that the animals in question were killed in defendant's stockyards and the carcasses afterwards removed and deposited in an obscure corner of his field a mile distant. Also there was positive and uncontradicted testimony from defendant and other witnesses which showed that he had nothing whatever to do with the killing of the horses.

It can be readily seen from a reading of the Memorandum Decision and Ruling by the trial court in the case at bar that the court intruded into the exclusive province of the jury and became a fact finder. The court did not take a detached view of the evidence from the standpoint of whether or not it was sufficient for the jury to find guilt, but instead weighed it and analyzed it as if the court were the jury.

The first ground given by the trial court was that

there was no evidence of defendant being under the influence of liquor. The court then proceeds to attempt a justification of this ruling on the mere fact that some of the witnesses admitted that some of the symptoms they had observed in Iverson could have been caused by shock rather than liquor. However in taking a detached view of the record it can be seen that at least four qualified witnesses who had varying degrees of contact with and observation of Iverson immediately after the accident and thereafter gave opinions that he was under the influence of liquor.

In ground No. 4 the court states that there was no evidence of intoxication. We assume that by this the court is referring to the evidence of percentage of alcohol in Iverson's blood. The court states that the evidence as to alcohol percentage was not competent evidence for the sole reason that Doctor K. Hill Blacker believed that the bottle was just over half full and that the State Chemist testified that the bottle was full when he received it. The conclusion that the trial court arrives at is most amazing in view of the following. The blood in question was drawn by Doctor Blacker on August 23, 1958. The entire transaction of the taking of this blood lasted approximately 3 minutes as recalled by Doctor Blacker. Doctor Blacker was asked by counsel for defendant to recall the exact level of the blood in this bottle several months after the blood had been drawn. There is nothing shown in this record indicating that Doctor Blacker had any reason to note the exact level of the blood in the bottle in question. All that appears is a 3 minute transaction which is one



among several in the ordinary day of a doctor and the doctor being quizzed in great detail some several months later concerning an obscure fact which he had no particular occasion to take special notice of. It can be seen from the record quoted hereinbefore that at the time of trial Doctor Blacker had nothing more than a vague impression in his mind, and yet the trial court on this one fact states that the blood test evidence is entirely worthless. It will be remembered that the State produced positive evidence as to the chain of possession of the bottle in question and that the witnesses testified that the bottle arrived in the office of the State Chemist in exactly the same condition that it was in when received. Certainly the trial court has assumed the mantle of a fact finder in this instance.

The evidence produced by the State establishing that the blood was received in the office of the State Chemist in exactly the same condition as it was when taken, clearly allows the evidence as to the alcohol percentage to be submitted to the jury. The matters which are mentioned by the trial court in its memorandum are matters which merely affect the weight of this evidence and matters which could be considered by the jury in weighing this evidence.

The State produced credible evidence that the blood was tested and double checked and that a percentage of .245 was shown. Also the State produced credible evidence that an hour and one half prior to the time when the blood was taken the alcohol percentage in defendant's blood would have been from .275 to .290. In addition to

this the State produced credible evidence that any person with such an alcohol percentage would be not only under the influence of alcohol, but would be on the verge of passing out completely. This was evidence which was admitted in the case and which could well authorize a jury to find that defendant was under the influence of intoxicating liquor at the time of the accident and that this intoxication substantially affected and rendered defendant "incapable of safely driving a vehicle."

In ground No. 2 as stated by the trial court in its memorandum decision, the court held that there was no evidence to show defendant drove his car recklessly, negligently or in disregard of the safety of others. The only elaboration made by the trial court as to this ground was to the effect that the witness who made the measurements said,

"There was nothing to indicated Iverson going at more than 50 miles per hour.' the legal speed."

Again the trial court has entered the exclusive province of the jury and has become a fact finder. It is submitted that there is substantial evidence of great speed on the part of defendant which the trial court has ignored. It will be remembered that David Padilla testified very definitely that he was traveling at a speed of approximately 45 miles per hour at the time he was hit with great force by defendant.

Also, the jury could well find that defendant layed down skid marks of 112 feet before crashing into the rear end of the Padilla car. In addition to this, the photographs in evidence will show that the impact be-

tween the two cars caused great and severe damage to both cars.

Furthermore, the witness, Ronald Zeldon Wall, observed the Iverson car shortly before the accident while proceeding in the opposite direction. He testified that in his opinion Iverson was traveling at a speed of close to 90 miles per hour and was traveling too close to the center line of the highway to be safe. As a matter of fact, this witness, expecting that something might happen, took special note of the Iverson car in his rear view mirror. He also testified that the Iverson car was traveling at a greater rate of speed than the other vehicles that he had observed going in Iverson's direction.

Certainly, from the foregoing, the jury in this case could well be justified in finding that Iverson was proceeding at a speed substantially in excess of the speed limit at the time in question.

In addition to this, there was substantial evidence from which a jury could well find that Iverson either was not keeping a lookout or that liquor had so affected him that he could not react to what he had seen. The witness, Padilla, testified that his tail lights were working, and other witnesses testified that the tail light which had not been smashed in the collision was still on after the Padilla car had come to rest.

On such a highway, the jury could well find that Iverson was not looking or could not react even if the tail lights had not been on at all on the Padilla car:

The automobile was there to be seen and the tail lights were on, making the car so that it would be most amazing for a person with his eyes open not to see said car.

The evidence of the speed and the failure to keep a look out or the inability to react could well justify a jury in finding that the defendant was in fact driving in utter disregard of the safety of others and in a reckless manner, let alone negligent. The wording of the statute would appear to allow a conviction on simple negligence.

In ground No. 3 stated by the trial court, it appears that the court has completely abandoned its function as a law giver and has in fact become the jury. The court states that there was no evidence to show the blood test had not been meddled with, in spite of the evidence heretofore pointed out which was definite and clear that the chain of possession was unbroken and that the blood arrived at the State Chemist in exactly the same condition as it was in when taken. It will be remembered that there was evidence that the bottle had been carefully sealed with tape and marked so that any attempt at meddling could be readily ascertained. Yet when the State Chemist received the bottle, the tape was in place, and he cut the tape in order to open the bottle. The only thing which the trial court has to go on in this regard is the mere statement made by some of the witnesses that it would be possible to remove the tape and put it back in exactly the same position. However there was not a whisper of evidence that anything improper had been done.

Certainly the jury would be authorized in finding that the blood test in question had not been meddled with.

In view of the evidence in the record in the framework of the well-established law, it is apparent that the trial court in this case has misconceived its function and has improperly refused to allow the jury to find the facts after the State has established a *prima facie* case.

### CONCLUSION

The trial court erred in taking the case at bar from the jury. The trial court misconceived its function and became a fact finder in a case where the evidence produced by the State justified a conviction. For the guidance of trial courts throughout the State it is earnestly urged that this court reaffirm the principles set forth in the case of *State vs. Thatcher* and restate said principles for the guidance of courts in future actions.

Respectfully submitted,

JAY E. BANKS, District Attorney  
of the Third Judicial District in  
and for the County of Salt Lake,  
State of Utah

PETER F. LEARY, Assistant

JOHN L. BLACK, Assistant

WALTER L. BUDGE, Attorney  
General, State of Utah

*Counsel for Plaintiff and  
Appellant*